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In The

Supreme Court of the United States

October Term, 1997

STEPHANIE PARKER-WEAVER, RIMS BARBER,
ERIK FLEMING, DAVID INGEBRETSEN,
AND ALI SHAMSID-DEEN,

Appellants,

v.

KIRK FORDICE, GOVERNOR OF MISSISSIPPI;
MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI;
CITY OF JACKSON, MISSISSIPPI;
AND TERRY WALLACE,
CITY ATTORNEY OF JACKSON, MISSISSIPPI,

Appellees.

**On Appeal From The
United States District Court
For The Southern District Of Mississippi**

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The State of Mississippi has failed to preclear, under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, a statute of statewide application permitting the creation of business improvement districts through election mechanisms that, among other things, limit the vote to property owners within the proposed district. The City of Jackson, Mississippi has failed to preclear the drawing of such a district, as well as the action of its City Council scheduling an election in the district pursuant to the statute. The District Court dismissed this Section 5 enforcement case for lack of standing even though the plaintiffs are residents and registered voters in the State and the City. The questions presented are:

1. Where lines for a single governmental district are drawn and qualifications imposed so that only some voters can participate in the election while others are excluded from voting at all, do those who are excluded have standing to challenge the failure to preclear those changes under Section 5?

2. For those who are excluded, is standing contingent upon alleging and presenting evidence to the local federal district court that the changes are discriminatory where the question of discrimination specifically is reserved by Section 5 to the Attorney General or the United States District Court for the District of Columbia?

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CITY OF JACKSON, MISSISSIPPI; AND TERRY WALLACE,
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Appellees.

On Appeal from the
United States District Court
for the Southern District of Mississippi

JURISDICTIONAL STATEMENT

Appellants request that this Court note probable jurisdiction of their appeal from the decision of a three-judge court of the United States District Court for the Southern District of Mississippi dismissing, on grounds of standing, their challenge under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to the State of Mississippi's failure to preclear a state statute related to voting, as well as the City of Jackson's failure to preclear the drawing of a district and the scheduling of an election pursuant to that statute.

OPINIONS BELOW

The July 2, 1998 opinion of the United States District Court for the Southern District of Mississippi is unreported, and is reproduced in the appendix to this petition. J.S. App. 1a.

JURISDICTION

The judgment of the District Court was entered July 2, 1998, and is reproduced at J.S. App. 12a. A notice of appeal was filed July 31, 1998, and is reproduced at J.S. App. 14a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

STATUTES INVOLVED

The federal statute involved is Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The Mississippi Business Improvement District Act, codified at Miss. Code Ann. §§ 21-43-101 through 21-43-133, also may be relevant. These provisions are set out verbatim at J.S. App. 18a.

STATEMENT OF THE CASE

The appellants are five Mississippi voters, three black and two white, all of whom live in the City of Jackson. They brought this action under Section 5 of the Voting Rights Act challenging the failure of the State to seek preclearance of Senate Bill No. 2672 of the 1995 session of the Mississippi legislature, codified at Miss. Code Ann. §§ 21-43-101, et seq. Entitled the Business Improvement District Act, that legislation authorizes the creation of business improvement districts in Mississippi through certain election procedures. The appellants also challenge in this case the failure of the City of Jackson to seek preclearance of the drawing of such a district pursuant to the legislation, and the scheduling an election for the

establishment of that district in the downtown Jackson area.

The Business Improvement District Act was signed into law on March 21, 1995. It provides for the creation of business improvement districts in Mississippi municipalities, but only "upon written ballot approval by seventy percent (70%) of the property owners in the district" in an election. § 21-43-119. Only property owners of record in the proposed district may vote in the election and votes are weighted in proportion to the amount of the assessment against properties in the district, with the proviso that no one property owner may possess more than one-third of the total votes which may be cast. §§ 21-43-115, 117(1).

Such a district may be composed only of contiguous areas zoned for some use other than residential. § 21-43-109. To initiate the creation of a district, property owners in such areas propose lines for the district, and 20% of the eligible property owners within those lines must sign a petition to the clerk of the municipality. § 21-43-111. A meeting is then held to which all eligible property owners are invited. A majority of the owners in attendance can agree to a district plan. § 21-43-113. A public hearing is then held to review the plan and receive comment about the process for accepting or rejecting the plan. § 21-43-117(1).

Following the public hearing, the governing authority of the municipality is required to set an election date not more than 60 days from the date of the public hearing. *Id.* A district plan shall be deemed adopted and ready for implementation "upon written ballot approval by seventy percent (70%) of the property owners in the district." § 21-43-119. Every five years, the process must be repeated and approved in order for the business improvement district to continue in existence. §§ 21-43-117(1), 131.

Once created, a business improvement district performs a number of public municipal functions. Among the activities it may pursue are fire prevention, assisting in law enforcement, street and sidewalk cleaning, drainage enhancements, economic development, tourism development, management of public facilities, upkeep of public parks, management of public parking, garbage collection, enhancement of water and sewer systems, and operation of community childcare centers. J.S. App. 3a; Miss. Code Ann. § 21-43-105(d).

A business improvement district may be funded in whole or in part by an assessment levied on property in the district based upon the gross square footage of the property. The amount of that assessment is determined by the district plan, and the governing authority of the municipality is required to levy the assessment at the same time and in the same manner as ad valorem taxes are levied. In addition, the business improvement district is authorized to apply for and receive public and private grants. § 21-43-123.

After passage of the legislation, a group known as Capital Center, Incorporated (CCI) invoked its procedures to create a business improvement district in the area of downtown Jackson. A district plan was developed and the City of Jackson, through its city council, set an election date, but the plan was defeated when it was not approved by 70% of the property owners. CCI then presented a second plan with a reconfigured district that was designed to remove from the district some of the property owners who had voted against the plan. The procedures of the legislation again were invoked. On May 14, 1996, the City of Jackson, again through its city council, set an election date of June 28, 1996 for the property owners in this district. At that election, over 70% of the property owners approved the plan and the business improvement district was established. CCI has been named as the district management group for the district. J.S. App. 4a.

No effort has been made to preclear the Business Improvement District Act, and no effort has been made to preclear the drawing of the district lines and the scheduling of an election using these lines. In August of 1996, the United States Attorney General advised the State of Mississippi that the legislation appears to involve voting changes which require preclearance. J.S. App. 4a, 16a.

This action subsequently was filed seeking declaratory and injunctive relief, and a three-judge district court was convened. The plaintiffs moved for summary judgment, contending that the changes relate to voting in a number of ways: They allow for the establishment of new voting districts from which those permitted to vote can create an authority with power to levy financial assessments and conduct certain public functions. They set out qualifications for voting in the districts and a mechanism for drawing the district lines and for alloting and counting the votes. They provide the means of scheduling elections in the districts, and in the case of the action of the City of Jackson, actually declare and set the date for such an election from a specific district.

The defendants opposed the motion for summary judgment, contending the changes are not voting changes, and the State defendants also filed a motion to dismiss for lack of standing. In the motion to dismiss, they argued that the plaintiffs, although residents and registered voters of the State and of the City of Jackson, have no standing to raise a claim under Section 5 because they neither reside nor own property within the business improvement district. J.S. App. 7a.

The District Court agreed and granted the motion to dismiss: "In that Plaintiffs neither reside, nor own property in either the BID [business improvement district] at issue or in any proposed BID, Plaintiffs have not alleged any cognizable injury." J.S. App. 9a.

The plaintiffs had contended that voters in the State and the City had a right to bring a preclearance enforcement action so that the Attorney General or the United States District Court for the District of Columbia could determine if the changes have a discriminatory purpose or effect. They also argued that people such as them, who were excluded from voting because of a lack of property ownership in the district, had a right to seek enforcement of Section 5 inasmuch as district lines could be drawn and property ownership qualifications could be adopted to fence people out for discriminatory reasons, or with a discriminatory effect. Even though the question of discriminatory purpose and effect is one left solely to the Attorney General or the District Court for the District of Columbia upon preclearance review, the District Court in the present case appeared to fault the plaintiffs for not alleging and presenting evidence of such discrimination here: "Plaintiffs present no evidence of such putative injury; . . . they do not even allege such line-drawing. . . ." J.S. App. 9a.

As already noted, the District Court specifically based its ruling on the fact "that Plaintiffs neither reside, nor own property in either the BID at issue or in any proposed BID." J.S. App. 9a. And the legislation limits voting to property owners and clearly excludes non-property owners such as the plaintiffs. Yet at one point in the opinion, in a somewhat contradictory passage, the District Court seemed to suggest that this exclusion had not been demonstrated:

> . . . Plaintiffs state that the "*potential* for exclusion demonstrates that standing is not limited to those who have been included, but instead is conferred upon those who have been excluded." (Pls. Opp'n Br. at 3) (Emphasis added). Once again, Plaintiffs do not present evidence; once again, they do not even allege that they have been excluded from either the BID at issue or any proposed BID. . . . Plaintiffs have not alleged that they are property

> owners in either the BID at issue or a proposed BID, or will otherwise be affected. Based on Plaintiffs' allegations that cabin our ruling on standing, they are not persons excluded from voting on the establishment of a BID.

J.S. App. 9a-10a (emphasis in original).[1]

Having concluded the plaintiffs lacked standing, the District Court did not address the substantive question of whether the changes at issue are voting changes subject to Section 5. J.S. App. 10a. Instead, it granted the motion to dismiss. This appeal follows.

THE QUESTIONS ARE SUBSTANTIAL

Not since the ground-breaking decision in *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969), has this Court addressed the issue of standing in the context of the unique and far-reaching enforcement mechanism of Section 5. In *Allen*, the Court held that when states and political subdivisions enact voting changes but fail to preclear them, private citizens have standing to bring suit in local federal district courts to enjoin implementation of the changes until preclearance is obtained. "It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements." *Id.*, at 557.

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[1] In some places in its opinion, the District Court mischaracterized the plaintiffs' arguments. The plaintiffs never contended "that, for § 5 standing, all that is necessary is to allege a violation," J.S.App. 7a, never based their standing argument on the fact that "the City does not challenge their having standing," J.S. App. 8a, and did not place sole reliance on *Clark v. Roemer*, 500 U.S. 646 (1991), as the "one case they cite in support of their having sufficient standing." J.S. App. 8a. These mischaracterizations ultimately are of little importance, but they are mentioned here so there are no misunderstandings.

That broad purpose, as this Court has said, is to "erase the blight of racial discrimination in voting." *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 118 (1978). The Act involves what this Court has called "a complex scheme of stringent remedies aimed at areas where voting discrimination has been the most flagrant." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). Prior to its passage, one of the obstacles to equality in voting was the fact that many states and political subdivisions would react to federal court decrees outlawing discriminatory practices by "resort to the extraordinary strategem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination." *Id.*, at 335.

> To prevent any further circumvention of constitutional policy, Congress adopted § 5 which provides that whenever a designated State or political subdivision wishes to change its laws, it must first demonstrate to a federal instrumentality that the change will be nondiscriminatory. By freezing each covered jurisdiction's election procedures, Congress shifted the advantages of time and inertia from the perpretrators of the evil to its victims.

Board of Commissioners of Sheffield, 435 U.S. at 121.

Under Section 5, voting changes may not be implemented unless they are first precleared by the United States Attorney General or the United States District Court for the District of Columbia. *Clark v. Roemer*, 500 U.S. 646, 652 (1991). In order to obtain preclearance, the jurisdiction seeking to implement the change must submit it to one of these authorities and must demonstrate that the change has neither a discriminatory purpose nor a discriminatory effect. *Board of Commissioners of Sheffield*, 435 U.S. at 121.

This Court has made it clear that with Section 5, "Congress intended to reach any state enactment which altered the election law of a covered jurisdiction in even a minor way." *Allen v. State Board of Elections*, 393 U.S. at 566. And as noted previously, the Court in *Allen* said that "[i]t is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements." *Id.* at 557.

Since the decision in *Allen*, this Court has had little occasion to address the subject of standing in Section 5 cases. Unfortunately, the District Court here, despite this Court's invocation in *Allen* of "the broad purpose of the Act," has adopted an excessively crabbed view of standing for purposes of Section 5. There are several problems with its decision.

Among these is the District Court's holding that a citizen cannot challenge the failure to preclear this statute of statewide application unless he or she resides or owns property within an actual or proposed business improvement district. In other words, the citizen cannot seek to enjoin implementation of the unprecleared statute until it already has been implemented through the drawing of a specific district. But that is contrary to the terms and purposes of Section 5. As this Court repeatedly has made clear, "[i]f voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." *Clark v. Roemer*, 500 U.S. at 653. That means they are entitled to an injunction *before* the change is implemented. But under the District Court's formulation, the implementation must occur first and no one would have standing until *after* the change was implemented. This is inconsistent with the prophylactic nature of Section 5's enforcement mechanism. As Mississippi voters living in a city subject to the implementation of this statute of statewide application, the plaintiffs have standing to challenge the statute under Section 5 whether or not they live in any

district, and whether or not any district already has been drawn.

But even if citizens of the state must await the implementation of this statute before they are allowed to challenge it, the legislation has been implemented in Jackson, where the plaintiffs live. Yet the District Court held that citizens in the city do not have standing under Section 5 unless they reside or own property within the district itself. "In that Plaintiffs neither reside, nor own property in the BID at issue or in any proposed BID, Plaintiffs have not alleged any cognizable injury." J.S. App. 9a.

Contrary to the District Court's view, standing is not limited to those who own property or reside in the district. Indeed, the very fact of exclusion -- the fact that some voters in a city cannot vote on the downtown business improvement district because they do not own property within it -- indicates those who are fenced out have an interest in enforcing Section 5. Certainly, those who are excluded have standing to raise an equal protection claim, as this Court made clear in *Quinn v. Millsap*, 491 U.S. 95 (1989), when discussing the holding in *Turner v. Fouche*, 396 U.S. 346 (1970):

> [I]n *Turner v. Fouche*, we specifically held that a person who does not own real property has Article III standing to challenge under the Equal Protection Clause a state-law requirement that one own real property in order to serve on a particular government board. 396 U.S. at 361-362, n. 23.

491 U.S. at 103. Indeed, restrictive election line-drawing has been successfully challenged in this Court by people who were excluded by the lines, and restrictive voting qualifications have been successfully challenged by people who did not meet the qualifications. *See, Gomillion v. Lightfoot*, 364 U.S. 340 (1960) (excluded black citizens permitted to challenge the drawing of municipalities' boundaries in a manner that left them outside the

city and unable to vote for city offices); *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (non-parent who neither owned nor leased real property permitted to challenge statute reserving the right to vote in school district elections to parents and those who own or lease real property).

If the District Court's ruling were to stand, it could have unfortunate implications for Section 5 enforcement. For example, this Court long has held that municipal annexations are voting changes requiring preclearance. *Perkins v. Matthews*, 400 U.S. 379, 388-389 (1971). Although the Court never said so in *Perkins*, it appears the plaintiffs there were pre-existing residents of the city rather than residents of the newly annexed areas. Under the District Court's apparent reasoning in the present case, residents of the city would not have had standing in *Perkins* to enforce Section 5. Only residents of the annexed areas would. In such a scenario, if an all-white subdivision were annexed to prevent a city from becoming majority black, only the white people in the subdivision would be permitted to bring a Section 5 action. And it could well be that few or none would have the incentive or will to do so. The same can be said of the business improvement district in this case. It may well be that property owners, given the exclusive right to vote, would be reluctant to do anything to threaten their monopoly. Surely, standing in Section 5 situations like these is not limited to those least likely to enforce the statute.

Perkins made it clear that Section 5 covers "a change in the composition of an electorate." *Id.* at 389, *citing, Gomillion v. Lightfoot*. As the Court said in *Perkins*, such a change would encompass any action that, "by including certain voters within the city and leaving others outside, . . . determine[s] who may vote in the municipal election and who may not." 400 U.S. at 388. Obviously, those left outside would have standing to enforce Section 5. In the present case, the changes had the effect of including certain people within the lines of the business

improvement district while leaving the plaintiffs and others outside, limiting voting to property owners within those lines. That certainly, in the words of *Perkins*, "determine[d] who may vote" in the business improvement district election. Given that there was *no* electorate before for any business improvement district, and there now is one, the actions of the State and City have led, again in the words of *Perkins*, to "a change in the composition of the electorate." Clearly, if a district previously existed with respect to which the plaintiffs were allowed to vote, and the boundaries or the rules were changed so that they could not, they would have standing to challenge the failure to preclear this "change in the composition of an electorate." The same should be true with respect to the current situation, where they are not allowed to be part of the electorate in the first place.

In response to this argument by the plaintiffs, the District Court said that they could not rely on the potential exclusionary effects of the voting changes at issue because the Court had been presented with no proof or allegation of racial discrimination. The Court stressed the conditional language of the plaintiffs' assertion that it is "possible" the lines of a business improvement district "could" have been drawn, and the property ownership qualification "could" have been adopted, with a discriminatory purpose or "could" have a discriminatory effect. J.S. App 9a. The Court then said:

> But, of course, for standing purposes, the injury must be *"actual or imminent, not conjectural or hypothetical," [United States v.] Hays*, 515 U.S. [737], 743 [(1995)] (emphasis added). . . . Plaintiffs present no evidence of such putative injury; . . . they do not even allege such line-drawing.

Id.[2]

Unfortunately, the District Court here confused its role with that of the Attorney General and the District Court for the District of Columbia. As this Court has stated repeatedly in Section 5 cases, it is not the business of the local district courts in enforcement actions to determine if the changes are motivated by racial discrimination or have that effect. Their task is to determine if the changes are in fact voting changes and if they have been precleared. *See, e.g., Allen v. Board of Elections*, 393 U.S. at 555-556 n. 19, 558-559, 570; *Perkins v. Matthews*, 400 U.S. at 383-385. That being the case, it also is not the burden of the plaintiffs to allege, much less present evidence, that the changes are discriminatory. Their task is to allege that the changes are voting changes that have not been precleared.

While the District Court criticized the plaintiffs for alleging only that it was "possible" the changes "could" be discriminatory, that is exactly the function of a local district court in an enforcement action -- determining if a type of change *could* effect voting. For example, in *Perkins v. Matthews*, an appeal from such a local enforcement action, this Court held that changes in the location of polling places are voting changes in light of the "potential" for discrimination inasmuch as the changes "might well have" a discriminatory effect, and also held that a municipal annexation is a voting change in light of the "potential" for discrimination. 400 U.S. at 388-389. In *Allen*, the Court said the same with respect to changes regarding independent candidacies because the changes "*might* . . . undermine the effectiveness of voters who wished to elect independent candidates." 393 U.S. at 570 (emphasis added). And when explaining that a statute changing certain positions

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[2] In the context of a motion to dismiss, it is unclear why the District Court referred on this occasion, as well as two others, to the plaintiffs' failure to *present evidence*.

from elective to appointive is a voting change, the Court in *Allen* pointed to the core function of Section 5:

> Such a change *could* be made either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such changes to scrutiny.

Id. (emphasis added).[3]

The plaintiffs are residents of the State of Mississippi and the City of Jackson, registered to vote in the jurisdictions that failed to preclear these voting changes. While the plaintiffs do not reside or own property in the district that has been

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[3] In what seems to be a contradictory passage of its opinion, the District Court states on the one hand that the plaintiffs are not property owners in the business improvement district, but on the other that they have not demonstrated their exclusion from voting with respect to the district:

> [Plaintiffs] do not even allege that they have been excluded from either the BID at issue or any proposed BID. . . . Plaintiffs have not alleged that they are property owners in either the BID at issue or a proposed BID, or will otherwise be affected. Based on Plaintiffs' allegations that cabin our ruling on standing, they are not persons excluded from voting on the establishment of a BID.

J.S. App. 9a. Of course, the state statute is clear that only property owners within the district can vote. And as the District Court said earlier in the opinion, it is undisputed "that Plaintiffs neither reside, nor own property in either the BID at issue or in any proposed BID." *Id.* Accordingly, it is not apparent why the District Court said at this later point in the opinion that plaintiffs "are not persons excluded from voting on the establishment of a BID." Clearly they are. This is not a basis for denying standing. *See, Turner v. Fouche*, 396 U.S. at 361-362 n. 23 (where statute limited school-board membership to freeholders, and where it was clear plaintiff was not a freeholder, it was not necessary for standing purposes to go further and prove that the plaintiff specifically had been excluded from membership on the school board).

implemented without preclearance, they are not thereby deprived of standing to challenge the Section 5 violations. And although they declined to allege discrimination before this District Court, they did so because this is not the proper forum for that allegation.

The District Court erred in dismissing this case. This Court should note probable jurisdiction to review that decision and to address the issue of standing under Section 5 of the Voting Rights Act.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, probable jurisdiction should be noted.

Respectfully Submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

No. 3:97-CV-642WS

STEPHANIE PARKER-WEAVER, RIMS BARBER, ERIK FLEMING, DAVID INGEBRETSEN, AND ALI SHAMSID-DEEN,

Plaintiffs,

versus

KIRK FORDICE, GOVERNOR OF MISSISSIPPI; MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI; THE CITY OF JACKSON, MISSISSIPPI; AND TERRY STONE CITY ATTORNEY OF JACKSON, MISSISSIPPI,

Defendants.

(Filed July 2, 1998)

Before BARKSDALE, Circuit Judge, and WINGATE and GEX, District Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Before we can review Plaintiffs' claims that both enactment by the State of Mississippi of the Business Improvement District Act, Mississippi Senate Bill No. 2672, MISS. CODE ANN. §§ 21-43-101 *et seq.*, and, pursuant to that Act, establishment by the City of Jackson of an election for a business improvement district (BID) in that City, in each instance without obtaining preclearance, violate § 5 of the Voting Rights Act or 1965, 42 U.S.C.

§ 1973c, we must first determine whether Plaintiffs have standing, in that none of them alleges either residence or property ownership in any existing or proposed BID. We DISMISS this action for lack of standing.

I.

Section 5 provides that, whenever a State or political subdivision "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting", the entity must obtain approval from either the United States District Court for the District of Columbia or the Attorney General of the United States that the proposed change does not have the purpose or effect of denying or abridging the right to vote on account of race, color, or other minority status. 42 U.S.C. § 1973c.

The five Plaintiffs, allegedly adult resident citizens and registered voters of the City of Jackson, Hinds County, Mississippi, filed this § 5 action in September 1997, challenging both the State's not obtaining preclearance of the Business Improvement District Act (Act), and the City's setting elections for the establishment of a BID in downtown Jackson without obtaining preclearance. Plaintiffs claim that the Act and the election are § 5 "voting changes", subject to preclearance.

The Act, signed into law on 21 March 1995, provides for the creation of BID's as a means of restoring and promoting business activity in the business areas of the State's municipalities. MISS. CODE ANN. § 21-42-103. A BID may be comprised of a contiguous area zoned for nonresidential use. MISS. CODE ANN. § 21-43-109.

The process for establishing a BID begins with delivery to the municipal clerk of a petition signed by at least 20 percent of the property owners in the proposed BID. MISS. CODE ANN. § 21-43-111. All property owners within the proposed BID are to receive notice of a meeting to propose a BID plan. MISS. CODE ANN. § 21-43-113.

The plan shall include a description of the BID boundaries; the proposed improvements, including their costs and proposed sources of financing and funding; proposed target dates for implementing the improvements; the naming of a district management group; and a listing of the individual properties to be included, with any assessment based upon gross square footage of buildings and unimproved real estate. MISS. CODE ANN. § 21-43-113. Permitted improvements include, *inter alia*, private security services to assist public law enforcement, street and sidewalk cleaning, fire prevention services, drainage enhancements, and tourism development services. MISS. CODE ANN. § 21-43-105.

The plan must be approved by a majority of the property owners attending the meeting. MISS. CODE ANN. § 21-43-113. The municipal clerk then notifies all property owners in the proposed BID of a public hearing to review the plan and receive comments about the process for accepting or rejecting it. MISS. CODE ANN. § 21-43-117.

Following the hearing, the municipal governing authority sets an election to be held within 60 days of the public hearing. MISS. CODE ANN. § 21-43-117. Property owners of record as of the date the initial notice of the petition was given are eligible to participate in the election. MISS. CODE ANN. § 21-43-115. And, if the plan is

approved by 70 percent of those property owners, the mayor of the municipality reviews the plan to ensure its compliance with the Act. MISS. CODE ANN. § 21-43-117.

"A district plan shall be deemed adopted and ready for implementation upon written ballot approval by seventy percent (70%) of the property owners in the district." MISS. CODE ANN. § 21-43-119. The process must be repeated every five years in order for the BID to continue. MISS. CODE ANN. § 21-43-131.

Plaintiffs allege that, after passage of the Act, Capital Center, Incorporated (CCI), invoked the Act's procedures to create a BID in the City; that, after an unsuccessful BID election, CCI reconfigured the proposed BID to remove some of the property owners who had voted against the plan; that, on 14 May 1996, the City set an election for 28 June 1996 for the proposed BID; and that, after more than 70 percent of the property owners approved the plan, the BID was established, with CCI as the district management group.

In August 1996, the United States Attorney General advised the State that the Act appears to require § 5 preclearance. Neither the Act, nor the City BID election pursuant to it, has been submitted for preclearance.

II.

This three-judge court was constituted pursuant to 28 U.S.C. § 2284. In addition to the City and State responding to Plaintiffs' summary judgment motion, the State moved to dismiss for lack of standing or, in the alternative, for summary judgment.

Concerning the cross-motions for summary judgment, it is quite well-known that it "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and submissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law". FED. R. CIV. P. 56(c). But, regarding standing, we will not review under the Rule 56 summary judgment procedures because no evidence has been submitted on this issue. *See* FED. R. CIV. P. 12(c).

Therefore, we examine standing pursuant to the State's Rule 12 motion. Needless to say, in "ruling on a motion to dismiss for want to standing, [we] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party". *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Of course, had standing not been raised by the State, we would have examined it *sua sponte*. A first principle of our limited Article III jurisdiction is that we "are under an independent obligation to examine . . . [it], and standing 'is perhaps the most important of [the jurisdictional] doctrines' ". *United States v. Hays*, 515 U.S. 737, 742 (1995) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990)). It goes without saying that, absent standing, "this Court would have no jurisdiction . . . and [it] would be cause for dismissal." *Fairley v. Patterson*, 493 F.2d 598, 603 (5th Cir. 1974). *See also, e.g., Nevares v. San Marcos Consolidated Indep. School Dist.*, 111 F.3d 25, 26 (5th Cir. 1997) ("Federal courts have no jurisdiction under Article III § 2 of the Constitution unless a case or controversy is presented by a party with standing to litigate.");

Cook v. Reno, 74 F.3d 97, 98-99 (5th Cir. 1996) (standing is jurisdictional prerequisite).

Along this line, it is the duty "of the party who seeks the exercise of jurisdiction in his favor . . . to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute". *Hays*, 515 U.S. at 743 (citation omitted).

> It is by now well settled that "the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Id. at 742-43 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

"It is consistent with the broad purpose of the [Voting Rights] Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements." *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969). But, a plaintiff claiming a § 5 violation must still comply with the basic constitutional requirements for standing. *See, e.g., Fairley*, 493 F.2d at 603 (issue is whether Voting Rights Act plaintiffs have sustained sufficient injury for standing); *Dutmer v. City of San Antonio, Texas*, 937 F. Supp. 587, 590-91 (W.D. Tex. 1996) (reciting three elements of standing Voting Rights

Act plaintiff must satisfy). Restated, even for a claimed § 5 violation, the three standing elements – injury, causation, and redressability – must nevertheless be established. It bears repeating that these three elements are the minimum required by the Constitution. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

In response to the State's noting that Plaintiffs "do not allege that any one of them is a resident . . . or . . . a property owner in any existing or proposed BID" (State Def.'s Mot. to Dismiss at 1), Plaintiffs state that simply because they "are adult resident citizens and registered voters of the State . . . and the City", this "is sufficient to confer standing in this Section 5 case". (Pls. Opp'n Br. at 1) In fact, they posit that "any voter in the state has standing to challenge the failure [by the State] to preclear [the] statute". (Pls. Opp'n Br. at 1) In so doing, Plaintiffs maintain that, under the State's theory, one could have standing only either after a BID had been drawn and an election scheduled or after a BID had been established. Plaintiffs note that, prior to then, it would be impossible to determine if they were residents or property owners of the proposed or established BID.

Plaintiffs' broad standing contention complements their position that, "under Section 5, no statute can be implemented or be effective as law unless and until precleared". (Pls. Opp'n Br. at 2) This, in turn, complements their position that, for § 5 standing, all that is necessary is to allege a violation. But, again, a plaintiff claiming a § 5 violation must still comply with the basic constitutional requirements for standing – injury, causation, and redressability.

In this respect, Plaintiffs' position on standing is so broad that it is tantamount to maintaining that standing is not necessary for claiming a § 5 violation. The one case they cite in support of their having sufficient standing, *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991), does not begin to permit the broad standing theory urged by Plaintiffs. In fact, the portion cited by Plaintiffs reemphasizes only that, *"[i]f voting changes subject to § 5* have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State [or political subdivision] from implementing the changes". *Id.* at 652-53 (emphasis added).

This, of course, has long been understood. Conversely, preclearance is *not* required if "voting changes" have *not* been implemented. That is the merits-issue here. But, Plaintiffs must first clear the standing barrier. In other words, "§ 5 plaintiffs" referenced in *Clark* – as must all plaintiffs in federal court actions – *must have standing.*

Plaintiffs also base standing on their being citizens of the City, it was involved in the BID election, *and the City does not challenge their having standing.* Again, federal courts, *not the parties,* decide standing; the City cannot waive it, to say the least. Second, in line with Plaintiffs' syllogism – we live in city, city involved in election concerning part of city, therefore we have standing – Plaintiffs wholly fail to show the prerequisites for standing. For example, would standing arise out of a *de minimis* use of city funds for its role in the election? As noted, Plaintiffs offer no evidence; they do not even so allege. (The same applies to the City's role in possible BID assessments. *See* MISS. CODE ANN. § 21-43-123 (1), (3), and

(4) and 21-43-127 (2) and (3).) Plaintiffs' other claimed bases for standing are discussed *infra*.

In that Plaintiffs neither reside, nor own property in either the BID at issue or in any proposed BID, Plaintiffs have not alleged any cognizable injury. In an attempt to demonstrate injury, they assert:

> It is *possible* the lines of a business improvement district *could* intentionally be drawn to exclude black citizens disproportionately, or *could* be drawn in such a way as to have that effect. The provision limiting voting to property owners *could* be designed to exclude black citizens, who are generally more poor than whites as a result of this nation's history of discrimination, or it *could* have that effect.

(Pls. Opp'n Br. at 2; emphasis added)

But, of course, for standing purposes, the injury must be *"actual or imminent, not conjectural or hypothetical"*. *Hays*, 515 U.S. at 743 (emphasis added). Again, Plaintiffs present no evidence of such putative injury; again, they do not even allege such line-drawing. In sum, they fail to show the required actual or imminent injury.

Continuing their line-drawing contention, Plaintiffs state that the *"potential* for exclusion demonstrates that standing is not limited to those who have been included, but instead is conferred upon those who have been excluded". (Pls. Opp'n Br. at 3) (Emphasis added.) Once again, Plaintiffs do not present evidence; once again, they do not even allege that they have been excluded from either the BID at issue or any proposed BID. Once again, their contention involves the conjectural and hypothetical, *not* the concrete, actual or imminent. Plaintiffs also

attempt to demonstrate standing by referencing the Act's allowing the BID to make improvements for security, fire prevention, tourism, economic development, and other traditional local governmental functions. They appear to contend that, because the BID supplements or displaces the City's efforts in these areas, persons excluded from voting on the establishment of a BID have standing to bring a § 5 action. Yet again, Plaintiffs have not alleged that they are property owners in either the BID at issue or a proposed BID, or will otherwise be affected. Based on Plaintiffs' allegations that cabin our ruling on standing, they are not persons excluded from voting on the establishment of a BID.

In sum, Plaintiffs fail to allege a cognizable claim, because they fail to allege a cognizable injury, among other things, sufficient to confer standing. Therefore, we lack jurisdiction to address the merits of this action. Obviously, because the State's motion to dismiss for lack of standing is meritorious, we express no opinion on whether the Act or the election implemented by the City are "voting changes" within the meaning of the Voting Rights Act, subject to § 5 preclearance.

III.

For the foregoing reasons, the State of Mississippi's motion to dismiss is **GRANTED**, and this action is **DISMISSED**.

/s/ Rhesa H. Barksdale
RHESA H. BARKSDALE
UNITED STATES CIRCUIT
JUDGE

/s/ Henry T. Wingate
HENRY T. WINGATE
UNITED STATES DISTRICT
JUDGE

/s/ Walter J. Gex, III
WALTER J. GEX, III
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

No. 3:97-CV-642WS

STEPHANIE PARKER-WEAVER, RIMS BARBER, ERIK FLEMING, DAVID INGEBRETSEN, AND ALI SHAMSID-DEEN,

Plaintiffs,

versus

KIRK FORDICE, GOVERNOR OF MISSISSIPPI; MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI; THE CITY OF JACKSON, MISSISSIPPI; AND TERRY STONE CITY ATTORNEY OF JACKSON, MISSISSIPPI,

Defendants.

JUDGMENT

(Filed July 2, 1998)

For the reasons stated in the opinion filed this date, the State of Mississippi's motion to dismiss is **GRANTED**, and this action is accordingly **DISMISSED**, at cost to Plaintiffs.

SO ORDERED, this the 2nd day of July, 1998.

/s/ Rhesa H. Barksdale
RHESA H. BARKSDALE
UNITED STATES CIRCUIT JUDGE

/s/ Henry T. Wingate
HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

/s/ Walter J. Gex, III
WALTER J. GEX, III
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

STEPHANIE PARKER-WEAVER, RIMS BARBER, ERIK FLEMING, DAVID INGEBRETSEN, AND ALI SHAMSID-DEEN,

Plaintiffs,

vs.

No. 3:97cv642WS
(Three-Judge Court)

KIRK FORDICE, GOVERNOR OF MISSISSIPPI; MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI; THE CITY OF JACKSON, MISSISSIPPI; AND TERRY WALLACE, CITY ATTORNEY OF JACKSON, MISSISSIPPI,

Defendants.

NOTICE OF APPEAL

(Filed July 31, 1998)

Plaintiffs Stephanie Parker-Weaver, Rims Barber, Erik Fleming, David Ingebretsen, and Ali Shamsid-Deen notice their appeal to the United States Supreme Court from the July 2, 1998 judgment of the three-judge district court dismissing their civil action and thereby denying the plaintiffs' claims for injunctive and declaratory relief under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. This Appeal is brought pursuant to the authority granted by 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

Respectfully Submitted,

/S/ Robert B. McDuff
ROBERT B. MCDUFF
Miss. Bar No. 2532
767 North Congress Street
Jackson, MS 39202
(601) 969-0802

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that the foregoing has been served on the following by first-class mail, postage prepaid:

Robert Sanders
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205-0220

Hugh Tedder
Office of the City Attorney
P.O. Box 17
Jackson, MS 39205-0017

The 31st day of July, 1998.

/s/ Robert B. McDuff
COUNSEL FOR PLAINTIFFS

[SEAL]

U.S. Department of Justice
Civil Rights Division

Voting Section
P.O. Box 66128
Washington, D.C. 30035-6138

Aug. 16, 1996

DLP:DHH:HEW:tlb
DJ 166-012-3
96-3345

Sandra Shelson, Esq.
Assistant Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205

Dear Ms. Shelson:

This is in reference to Senate Bill No. 2672 (1995), which authorizes the creation of business improvement districts within municipalities, and which appears to involve changes in standards, practices, or procedures with respect to voting.

Our records fail to show that these changes affecting voting have been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. If our information is correct, it is necessary that these changes either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that they do not have the purpose and will not have the effect of discriminating on

account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable without Section 5 preclearance. *Clark* v. *Roemer,* 500 U.S. 646 (1991); Procedures for the Administration of Section 5 (28 C.F.R. 51.10).

Should you elect to make a submission to the Attorney General for administrative review rather than seek a declaratory judgment from the District Court for the District of Columbia, please follow the procedures set forth in Subparts B and C of the procedural guidelines.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Mississippi plans to take concerning this matter. If you have any questions, you should call Ms. Hallue Wright (202-307-6261) of our staff. Refer to File No. 96-3345 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

BY: /s/ Zita Johnson Bates

for Elizabeth Johnson
Chief, Voting Section

STATUTES INVOLVED

42 U.S.C. § 1973c:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section

4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to re-examine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the

provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

Miss. Code Ann.; §§ 21-43-101, et seq.:

§ 21-43-101. Short title.

Sections 21-43-101 through 21-43-133 shall be known and may be cited as the "Business Improvement District Act."

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§ 21-43-103. Legislative findings of fact and declaration of intent.

The Legislature finds that:

(a) The business districts within many municipalities in the state are in a deteriorated condition;

(b) This deteriorated condition affects the economic and general welfare of the people of the State of Mississippi;

(c) Establishment of business improvement districts is an effective means for restoring and promoting business activity; and

(d) It is the intent of the legislature to provide for a process for establishing these districts.

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§ 21-43-105. Definitions.

For the purposes of §§ 21-43-101 through 21-43-133 the following terms shall have the meanings ascribed herein unless the context shall otherwise require:

(a) "District" means a business improvement district established pursuant to §§ 21-43-101 through 21-43-133.

(b) "District management group" means an established and independent Mississippi non-profit corporation and may also include a local Chamber of Commerce, a downtown development corporation, a Main Street Project or a department of a local municipality as determined solely by a simple majority of the property owners included in the district.

(c) "District plan" means a set of goals and strategies as collectively determined by a majority of the property owners included in the district and as incorporated within §§ 21-43-101 through 21-43-133.

(d) "Improvements" means any capital project constructed within the public areas, with the approval of the municipality, for any business improvement district or services established under §§ 21-43-101 through 21-43-133 to

improve the appearance or economic functioning of property located within the district including, but not limited to:

(i) Parks and related facilities;

(ii) Sidewalks, street curbing, street medians, planting areas, underground utilities, lighting standards or fountains;

(iii) Trees, shrubs, flowers or other vegetation;

(iv) Security services which may include assistance to public law enforcement through employment of private security personnel and the purchase of equipment or technology;

(v) Economic development services and assistance including, but not limited to, promotion of business, retail or industrial development developer recruitment, business recruitment, business marketing and business retention;

(vi) Parking management;

(vii) Street and sidewalk cleaning;

(viii) Recreational and/or cultural activities;

(ix) Training programs for employees of businesses within the district;

(x) Any other services, events or activities which will enhance the economic prosperity, enjoyment, appearance, image and safety of the district;

(xi) Refuse collection and disposal services;

(xii) The production and marketing of special events and festivals;

(xiii) Management of public facilities;

(xiv) Fire prevention services;

(xv) Water and sewer system enhancement;

(xvi) Drainage enhancements;

(xvii) Signage installation and removal;

(xviii) Planning studies;

(xix) Marketing studies;

(xx) Tourism development services; and

(xxi) Collective community child care centers.

(e) "Property owner" means that person or persons, entity or entities possessing a majority of the ownership interest in a piece of taxable real property.

(f) "Tax exempt properties" means properties which are exempt from certain real property taxes pursuant to Section 27-31-1.

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§ 21-43-107. Creation of business improvement districts authorized.

There is hereby authorized the creation of business improvement districts which shall be established in

accordance with the procedures described in §§ 21-43-101 through 21-43-133.

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§ 21-43-109. Zoning

All areas included in a business improvement district must be zoned for some use other than residential. Residential uses may be included if the property is zoned for commercial or industrial use and the property is not owner-occupied as a homestead. Properties comprising a business improvement district must be contiguous to the other properties to be benefited in the district with the exception of public streets, alleys, parks and other public rights-of-way and tax exempt properties within the district boundaries.

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§ 21-43-111. Initiation of efforts to form business improvement district.

Notice shall be given to the municipality in which the district is to be established when an effort is begun by a contiguous group of non-residentially zoned local property owners to form a business improvement district. Upon delivery of a petition to the clerk of the municipality, signed by at least twenty percent (20%) of the property owners in an area proposing to establish a business improvement district, efforts can begin to form a

business improvement district pursuant to §§ 21-43-101 through 21-43-133.

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§ 21-43-113. Notice of meeting for development of district plan; requirements for approval of proposed plan; contents of proposed plan.

In order to establish a business improvement district, and upon establishment, every fifth year thereafter, those property owners which make up the area of the proposed district shall be notified of a meeting by United States mail no less than ten (10) days prior to the scheduled date of the meeting. Notification shall include the specific location, date and time of the meeting. The goal of the meeting shall be to develop a district plan for the upcoming five-year period. Such plan shall be agreed upon by a majority of those property owners in attendance at the meeting. Such district plan shall include the following:

(a) A description of the boundaries of the district sufficient to identify the lands included;

(b) The improvements proposed and the maximum cost thereof for each of the coming five (5) years;

(c) The total amount proposed to be expended for improvements for and in the district during the upcoming five (5) years;

(d) The proposed source or sources of financing and funding for the improvements;

(e) The proposed target dates for beginning the implementation of the improvements;

(f) The naming of the district management group for the upcoming five (5) years; and

(g) A listing of the individual properties to be included in the district with any assessment computed and identified for each property based upon gross square footage of buildings and unimproved real estate. The plan may provide that tax exempt properties be included in the district but not be subject to any assessment.

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§ 21-43-115. Voting upon proposed district plan.

All property owners of record in the proposed district as of the date of initial notice given as provided in Section 21-43-111, shall be eligible to participate in the process to approve or reject the district plan and the proposed assessment for properties in the district. Votes of property owners within the proposed district shall be weighted in proportion to the amount of the assessment against properties in the district; provided, however, that in no case shall the total number of votes assigned to any one such property owner, through common ownership of property, be equal to more than one-third (1/3) of the total number of votes which may be cast.

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§ 21-43-117. Notice of hearing for review of proposed district plan; conduct of election upon proposed district plan; notice of election results; review of approved plan by mayor of municipality; disbursement of proceeds from assessment.

(1) For initial creation of the district, reauthorization of the district at the end of each five-year period, amendment to the district plan within the five-year plan period or modification of the boundaries of the district at the end of a five-year period, the clerk of the municipality shall notify all property owners to be included in the proposed district of a public hearing to review the plan and receive comment about the process for accepting or rejecting the plan. Following a public hearing, the governing authority of the municipality shall set an election date not more than sixty (60) days from the date of the public hearing. The ballot shall clearly state the issue to he decided. Only property owners of record as of the date of initial notice given as provided in Section 21-43-111 shall be eligible to participate in any such election.

(2) Notice of an election to create, continue, amend or extend a district shall be:

(a) Mailed to each of the district property owners of record thirty (30) days prior to the election, and

(b) Published at least twice in a newspaper of general circulation in the municipality, the first publication shall be not less than ten (10), nor more than thirty (30) days before the date for the election. The notice shall include a copy

of the plan, a ballot for the election and a notice about the time and date for the election.

(3) Not less than ten (10) nor more than thirty (30) days before the date set for the election, the governing authority of the municipality shall cause a copy of the plan and the ballot to be posted in the lobby of its city hall.

(4) Ballots shall be marked, signed and submitted by the eligible property owner to the clerk of the municipality by the date designated on the ballot.

(5) The clerk of the municipality shall notify the property owners in the district of the result.

(6) If the plan is approved by seventy percent (70%) of the property owners, the mayor of the municipality shall review the district plan to ensure its compliance with the provisions of §§ 21-43-101 through 21-43-133.

(7) The municipality shall disburse the proceeds collected from the assessment to the designated district management group within thirty (30) days after the assessment is due.

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§ 21-43-119. Requirements for approval of district plan; requirements for reauthorization, amendments of district plan or modification of boundaries.

A district plan shall be deemed adopted and ready for implementation upon written ballot approval by seventy percent (70%) of the property owners in the district. Reauthorization, amendments or the district plan or modification of boundaries shall also be subject to written ballot approval by seventy percent (70%) of the eligible property owners.

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§ 21-43-121. Designation of district management group; fees and costs chargeable to district; contracts for specialty services.

(1) Each district established pursuant to the provisions of §§ 21-43-101 through 21-43-133, must designate in its district plan an existing local nonprofit organization or department of local government as the district management group for execution of day to day activities for the district and for implementation of the district plan. Designation of the district management group shall be decided solely by the property owners affected by the creation of the district. Selection of a district management group shall be included in the district plan voted upon by the property owners in the district.

(2) Reasonable management fees, operational reimbursements, administrative costs and program implementation fees may be charged to the district by the district management group during the duration of an approved district plan.

(3) The district management group may, in its discretion, contract as needed with outside third party sources for specialty services needed to implement the district plan.

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§ 21-43-123. Authorization of assessments for funding of district; lien for assessments; receipt of grants and donations by district.

(1) A business improvement district may be funded in whole or in part by an assessment authorized pursuant to this section. Such assessment shall be in addition to any taxes or assessments that may be imposed on property that is included in the district.

(2) The assessment shall be levied on the property in the district based upon the gross square footage of the property. The district plan shall set the amount that shall be assessed on each square foot of property. A district plan may authorize that the assessment per square foot for buildings may be at a different rate than that for land; provided, however, that the square foot rate for each type of property shall be uniform.

(3) Upon presentation of a district plan by a district created pursuant to §§ 21-43-101 through 21-43-133, the governing authorities of a municipality shall, at the same time and in the same manner as ad valorem taxes are levied, levy the assessment provided for in this section on the property in the district in the amount specified in the district plan.

(4) Assessments shall constitute a lien upon the respective lots or parcels of land and other real property upon which they are levied, superior to all other liens except those for state and county taxes.

(5) In addition to the assessment authorized under this section, a business improvement district shall also be authorized and empowered to apply for and receive public and private grants and to accept any monetary contribution or donation of real or personal property.

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§ 21-43-125. Financing of improvements in districts.

The expenses incurred in the construction, designing, planning, marketing, administration or operation of any improvement in a district shall be financed in accordance with the district plan. Upon the establishment, reauthorization, amendment or extension of the district, property owners within the district shall be charged the assessment pursuant to the plan. Improvements must be in addition to or an enhancement of those provided to the

district by the municipality prior to the establishment of the district.

---

§ 21-43-127. Imposition and collection of assessment.

(1) The assessment upon benefited real property pursuant to §§ 21-43-101 through 21-43-133 shall be imposed as established in the district plan.

(2) The governing authorities of the municipality shall annually certify to the tax collector, or other officer charged with the duty of collecting taxes in the municipality, the annual installment of assessment due from each tract of land against which an assessment has been levied. The collector shall thereupon enter upon the annual tax roll of the municipality, in a separate column, the amount of the installment to be collected for each tract of land assessed, and the collector shall collect such installment at the same time he collects the annual municipal tax.

(3) All assessments levied under the provisions of §§ 21-43-101 through 21-43-133 shall be enforced in the same manner in which the payment of other municipal taxes is enforced, and all statutes regulating the collection of other municipal taxes shall apply to the enforcement and collection of the assessments levied under the provisions of §§ 21-43-101 through 21-43-133.

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§ 21-43-129. Custody and disbursement of proceeds of assessments; district fiscal year; permissible improvements.

The proceeds of any assessment imposed pursuant to an approval district plan shall be held by the chief fiscal officer of the municipality until disbursed to the designated district management group. A business improvement district shall operate on the same fiscal year as that of the municipality. None of the proceeds collected pursuant to §§ 21-43-101 through 21-43-133 shall be used for any purposes other than those set forth in the approved district plan. Improvements provided by a district using district funds may be undertaken only when the service, events, project or activity undertaken is not for the sole benefit of any particular property owner or other private party.

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§ 21-43-131. Duration of initial authorization of district; requirements and procedure for reauthorization.

The initial authorization for any business improvement district shall be for five (5) years. During the last twelve (12) months of the fifth year of the authorization, a new district plan must be developed which meets all of the initial requirements of the district plan plus reauthorizes the district for another five (5) years. Reauthorization requires the same approval process as initial establishment and authorization of the district. Should the district

fail to receive reauthorization from the affected property owners in the district, the business improvement district will cease to exist at the conclusion of the most recently approved five-year period or as soon thereafter as any outstanding indebtedness is satisfied. The ability to reauthorize rests solely with the affected property owners in the district.

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§ 21-43-133. Dissolution of district.

(1) Any district established or extended pursuant to the provisions in §§ 21-43-101 through 21-43-133, which has satisfied all indebtedness incurred to accomplish any of the purposes of the district, may be dissolved by the governing authority of the municipality upon:

(a) Written and certified petition from the property owners within the district who collectively represent more than seventy percent (70%) of the total assessed valuation of all benefited real property in the boundaries of the district, or

(b) The district plan terminates when no reauthorization has occurred as set forth in §§ 21-43-101 through 21-43-133.

(2) Upon dissolution of a business improvement district, any assets of the district remain shall be transferred to the municipality.

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(2)

FILED
OCT 29 1998
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SUPREME COURT, U.S.

No. 98-548

In The

Supreme Court of the United States

October Term, 1998

STEPHANIE PARKER-WEAVER, *et al.*,

Appellants,

v.

KIRK FORDICE, *et al.*,

Appellees.

On Appeal From The United States District Court
For The Southern District Of Mississippi

MOTION TO AFFIRM

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ISSUES PRESENTED

The simple issue presented by this appeal is whether the ordinary, and well established, rules of standing apply to a Section 5 Voting Rights Act case, or, whether instead, some special, and lesser, test of standing should be devised and applied to such cases. The District Court applied the criteria fashioned by this Court to determine Article III standing, and determined that the plaintiffs did not have standing to prosecute this Section 5 action. On appeal the plaintiffs essentially argue that in Section 5 cases any registered voter, whether or not he is directly affected by a particular voting change, has standing to mount a Section 5 challenge. The plaintiffs contend that this is so even without meeting the normal standing requirement of actual or imminent injury. If, as the District Court found, the ordinary elements of standing apply in Voting Rights Act cases this Court should summarily affirm the district court's judgment. Probable jurisdiction should be noted only if the Court wishes to create a different test for determining standing in Voting Rights Act cases, or if the Court wishes to overrule the many cases addressing standing and change the elements necessary for establishing standing generally.

PARTIES TO PROCEEDINGS BELOW

(1) Stephanie Parker-Weaver, Rims Barber, Erik Fleming, David Ingebretsen, and Ali Shamsid-Deen, Appellants herein.

(2) Kirk Fordice, Governor of Mississippi, Mike Moore, Attorney General of Mississippi, City of Jackson, Mississippi, and Terry Stone, former City Attorney for Jackson, Mississippi, Appellees herein.

(3) The plaintiffs list Terry Wallace, the present City Attorney for Jackson, Mississippi as a party. The Complaint itself lists Terry Stone, the former City Attorney, as defendant. No order was ever entered substituting Terry Wallace for Terry Stone.

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MOTION TO AFFIRM

Pursuant to Rule 18.6, the Appellees move this Court to summarily affirm the judgment of the District Court. The questions sought to be raised by the Appellants are so insubstantial that full review is unnecessary. The District Court's decision presents no conflict or issue of statutory or constitutional interpretation that requires resolution by this Court.

STATEMENT OF THE CASE

A. Facts

The District Court dismissed the Complaint below on a Fed. R. Civ. P. 12(b) motion based on the plaintiffs' lack of standing. Accordingly, the "facts" set out in this brief are those pleaded in the Complaint.

In 1995, the Mississippi legislature enacted the Business Improvement District Act, Miss. Code Ann. §21-43-101, *et seq.* The legislation was modeled on similar laws that are common in other jurisdictions. The statutes merely allow like minded property owners in, and residents of, a contiguous geographic area to form an association and levy assessments against themselves based on the amount of property they own. Money raised by assessments may be used for various purposes which the members of the district perceive will improve the area. The funds may be used for matters ranging from landscaping to enhanced security or trash pickups. To the extent the members choose to direct funds toward enhancing services which are normally performed by city

government, those extra services are supplementary only. The city continues to provide its usual services in its usual manner.

The enabling legislation was needed only because city governments have a limited role to perform in the Business Improvement District (BID) construct. City governments have two functions with regard to BIDs. First, the assessments chosen by the BID members are collected by the city through its usual tax collection mechanisms. Second, the city helps conduct the initial BID election which determines whether the BID will be formed. The fact that the city has a role in BID elections is what prompts the plaintiffs' contention that Voting Rights Act requirements apply to the BID process.

In reality, BID elections are not political elections which determine political control of a governmental body. In short, they are not political elections within the ambit of the Voting Rights Act. Eligibility to vote in BID elections is determined solely by property ownership or residence within the proposed BID. Citizenship is irrelevant. It is also irrelevant that an individual may be a registered voter for political elections. The property owner may be a corporation or an alien, or both. The election itself is conducted by mail. There are no polling booths or other indicia of a normal political election. The role played by the city is merely the role of an honest broker for purposes of receiving and counting votes.

The plaintiffs do not allege in the Complaint, and do not otherwise contend, that any one of them is a property owner or resident of any existing or proposed BID. None even alleges property ownership at all. They allege

merely that they are registered voters (for purposes of normal political elections). None of the plaintiffs has alleged any particular injury to himself by reason of the fact that the BID enabling statutes were never submitted for Section 5 preclearance. There are two sets of defendants. Fordice and Moore are the State defendants representing the State of Mississippi. Stone and the City of Jackson are the local defendants representing the City of Jackson.

There has been one actual BID established in Jackson, Mississippi. It was established in 1996. No Section 5 submission was made in conjunction with the election for that BID, and the plaintiffs complain of that fact also. As with the enabling statutes, the plaintiffs have made no allegation regarding particular injury to themselves regarding the Jackson BID election.

B. Proceedings In The District Court

The Complaint was filed on September 4, 1997. A three-judge District Court was empaneled on October 14, 1997. The State defendants filed their Motion To Dismiss, Or, In The Alternative, For Summary Judgment circa February 7, 1998. The defendants' motion argued that the plaintiffs were without standing to prosecute this action, and that BID elections were not, in any event, within the coverage of Section 5 of the Voting Rights Act. On July 2, 1998, the District Court entered its Judgment dismissing the Complaint for want of standing. The plaintiffs filed their Notice of Appeal on July 31, 1998.

ARGUMENT

A. The District Court Correctly Determined That The Plaintiffs Were Without Standing

The District Court correctly applied the test used by this Court to determine standing as set forth in *Valley Forge Christian College vs. Americans United For Separation Of Church And State, Inc.*, 454 U.S. 464, 472 (1982); *Lujan vs. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); and *United States vs. Hays*, 515 U.S. 737, 743 (1995). The District Court set out the rule, as quoted from *Hays*, at 742-43, as follows:

> It is by now well settled that "the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

The District Court correctly noted that none of the plaintiffs claims to be a property owner or resident of an existing or proposed BID. Accordingly, the District Court concluded that, whether or not the matters in question are subject to Section 5, and whether or not a Section 5 violation actually exists, the plaintiffs do not have standing to raise the issue. The plaintiffs position, essentially, is that if they do not raise the issue it might not be raised

by anyone else. The plaintiffs' argument is little more than a claim of standing by default.

The plaintiffs' only rationale for the existence of standing is that they are registered voters of the City of Jackson and they perceive that a Section 5 violation exists. They argue that even though the BID statutes and the formation of the BID in Jackson have not personally affected them, they are automatically entitled to prosecute Section 5 cases relating to BIDs simply because they have taken the trouble to register to vote. The District Court pointed out that the plaintiffs' failure to allege any specific or particularized injury to themselves precludes a finding that the plaintiffs have standing. (App. to J.D., p. 9a)

In their Jurisdictional Statement the plaintiffs argue that potential harm is the hallmark of Section 5 actions, and that, accordingly, the possibility that one of them might someday be harmed in some way is enough to confer standing. The plaintiffs' argument confuses the two very separate concepts of Section 5 coverage on the one hand, and standing on the other. It is correct that voting rights cases are concerned with potential, as well as actual, harm. In covered jurisdictions, it is well settled that where any change in any standard, practice, or procedure carries with it the potential for a change relating to voting, Section 5 coverage attaches. Voting rights cases do not, however, hold that standing attaches to a particular person whenever there is merely the potential that the particular person will suffer injury by reason of a particular change.

The plaintiffs offer the example of *Perkins vs. Matthews*, 400 U.S. 379, 388-89 (1971), in support of their argument. In *Perkins* it was held that minority voters living within a city were proper plaintiffs to challenge an annexation even though none of the plaintiffs lived within the annexed territory. The plaintiffs reason that this is analogous to their situation of not living within an existing or proposed BID. In *Perkins*, however, minority voters living in the pre-existing municipal boundary could clearly, and concretely, have the power of their votes diluted by the addition of predominantly white voters to the composition of the city electorate. In contrast here, the plaintiffs will not be affected in any manner by the existing BID or any proposed BID. BIDs have no effect whatsoever on the composition of the city electorate, and no effect whatsoever on any other aspect of city elections or city services. The plaintiffs' recitation of *Perkins* is merely another example of, as the District Court put it, the plaintiffs' "position that, for §5 standing, all that is necessary is to allege a violation." (App. to J.S., p. 7a)

The plaintiffs point repeatedly to instructions in voting rights cases that the Voting Rights Act is to be liberally construed so that the objectives of the Act can be best realized. None of those cases, however, does anything to lessen the basic test of Article III standing. The District Court correctly refused to read into the Voting Rights Act any lower threshold for determining the core element of standing. The plaintiffs have demonstrated nothing more than a generalized interest in matters relating to voting. This Court should summarily affirm the District Court's ruling.

B. Neither The Mississippi Statutes Nor The Application Of Those Statutes Is Covered By Section 5

The District Court's dismissal of the Complaint should be upheld, or, alternatively, the Plaintiffs' suggestion of probable jurisdiction should be denied, for another reason as well. The matters which are the subject of this action simply are not within the coverage of Section 5 of the Voting Rights Act.

It is important to note that nothing in §21-43-101, *et seq.* in any way affects anything contained in the Mississippi Election Code, Miss. Code Ann. §23-15-1, *et seq.* The provisions of §21-43-101, *et seq.* do not effect any change in any statutory provision for voter registration, candidate qualification, the composition of any existing electorate, or the time or manner of election for any office or any issue relating to any political subdivision of the State. The elections contemplated by §21-43-101, *et seq.* have nothing to do with governmental policy, the formation of governmental policy, or the administration of governmental policy.

The plaintiffs' theory is nothing more than the notion that elections created or conducted *by* governmental authority somehow equate to elections *about* governmental authority. The plaintiffs offer no authority in support of this view. The simple fact is that the State may create, and in this case has created, an electoral process that has nothing to do with public governance on any level. Accordingly, neither the enabling legislation nor the actual creation and conduct of a BID is covered by Section 5. The municipal participation in BID elections is

nothing more than the insertion of an honest broker into the BID process as a matter of facilitation. Governmental services at all levels are commonly directed to assist private undertakings ranging from boosting tourism to forming neighborhood watch organizations, but the businesses or organizations which benefit from such activities do not thereby lose their status as private undertakings. Similarly, the mere fact that municipalities are directed by the Act to assist BIDs in achieving their goals does nothing to change the private nature and purpose of any BIDs. Elections under §21-43-101, *et seq.* are as essentially private as any elections conducted by any other private organizations. The plaintiffs' theory that a BID is a "public entity" is simply incorrect.

It seems too fundamental for dispute that the electoral process protected by the Voting Rights Act is the electoral process relating to political and policy control of government. The precept is so fundamental that it is not expressly stated in the Act, the regulations comprising the administrative procedures for the Act, or the cases interpreting the various provision of the Act. Section 14(c)(1) of the Act, 42 U.S.C. §1973L(c)(1), sets forth that the "terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election . . . with respect to candidates *for public or party office and propositions* for which votes are received in an election." (emphasis added) The voting which takes place in association with BIDs simply is not concerned with public office or public propositions, and is not, by definition, within the reach of the Act.

Section 14(c)(2) of the Act, 42 U.S.C. §1973L(c)(2), defines the term "political subdivision" of a State to

include any county, parish, "or other subdivision of a State which conducts registration for voting." This term was interpreted broadly in *U.S. vs. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 118 (1978) to include "all entities having power over any aspect of the electoral process . . . " The term "electoral process" was not defined, but it clearly refers to elections relating to direct political or policy control of government.

The issue of whether elections created or conducted *by* governmental authority are necessarily *about* governmental authority, or are otherwise concerned with the requisite "electoral process", is informed somewhat by reference to the regulations governing administration of Section 5. The potential for Section 5 coverage for actions of political parties is covered by 28 C.F.R. §51.7. The section provides that actions of political parties may be covered by Section 5 "(a) If the change relates to a public electoral function of the party, and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction . . . " Here, the BID is clearly acting under authority granted by a covered jurisdiction, the State, but the requirement of a relation to a public electoral function is absent. The defendants are not aware of any other statutory or regulatory provision which purports to extend Section 5 coverage to an entity which is not a political subdivision of a covered jurisdiction. To the extent §51.7 amounts to rule for assessing coverage for entities that are not political subdivisions of a covered jurisdiction, the actions challenged are clearly not covered by the Act.

This Court and lower courts have had occasion to examine the governmental nature of special purpose districts before. *see, Ball vs. James*, 451 U.S. 355 (1981); *Salyer vs. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973); and *Kessler vs. Grand Central District Management Ass'n*, 960 F.Supp. 760 (S.D.N.Y. 1997). The cases generally hold that, at least for purposes of one man one vote analysis, the functions of special purpose districts are so limited that the districts do not qualify as true governmental units. If the function of such bodies is not sufficiently governmental to bring those bodies within the reach of one man one vote requirements, then elections for such bodies can not be sufficiently political to bring those elections within the reach of Section 5. For the same reason, the adoption of the enabling legislation is not covered by Section 5.

The *Kessler* case is particularly instructive. *Kessler* involved a BID functionally indistinguishable from BIDs which may be created in Mississippi. The *Kessler* court held that the BID's authority to make assessments against property in the district is not equivalent to the power to levy taxes, and is not, therefore, an indication of governmental power. *supra*, at 773, and fn. 15. The power to make assessments is the same for Mississippi BIDs under Miss. Code Ann. §21-43-123(1). The court held that even though some of the services which BIDs can provide may overlap with core governmental services such as security or sanitation, the provision of these services is secondary, and supplemental, to the primary provision of these services by the city. *id.*, at 774.

The defendants do not dispute, of course, that some special or limited governmental units such as school

districts or water districts routinely submit electoral changes for Section 5 preclearance. These limited rule districts administer the provision of *essential* services normally provided by government. The fact that smaller governmental subunits are created is simply a matter of perceived efficiency. There is no issue regarding the governmental nature of the services they provide. BIDs, on the other hand, merely administer programs which the property owners deem *desirable*. The usual governmental entities continue to administer essential governmental functions within the BID geographic area. The provision of these essential governmental services to anyone who happens to live within a BID are not affected by the existence of a BID, or by anything a BID may choose to do or not do. To the extent a BID might choose to provide services which enhance the basic provision of services by the government, such additional effort is, as stated in *Kessler*, merely supplementary. The fact that other limited purpose districts having qualitatively different functions may be covered by Section 5 does not change the private nature of BID activities, and does not advance the proposition that the present State legislation or BIDs are covered by Section 5.

CONCLUSION

The District Court was correct to apply the standing test fashioned by this Court. The plaintiffs offer no rationale for the application of any other test. The District Court's judgment should be affirmed for this reason. Alternatively, the judgment should be affirmed because the matters complained of herein are not within the coverage of Section 5 of the Voting Rights Act.

Respectfully submitted,

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On Appeal From The United States District Court For The Southern District Of Mississippi

BRIEF OPPOSING MOTION TO AFFIRM

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In the page of their motion to affirm listing the questions presented, the appellees claim that appellants are seeking "some special, and lesser, test of standing" for cases brought under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. But that is not the case. As we point out in our jurisdictional statement, people such as appellants who are excluded from voting because of property requirements and a districting configuration clearly have standing to raise an equal protection claim. J.S. 10-11, *citing, Quinn v. Millsap,* 491 U.S. 95 (1989);

Turner v. Fouche, 396 U.S. 346 (1970); *Gomillion v. Lightfoot*, 364 U.S. 340 (1960); and *Kramer v. Union Free School District*, 395 U.S. 621 (1969). To contend, as we do, that they also have standing under Section 5 is not to invoke a "lesser" test of standing.

Of course, any standing question must be analyzed with reference to the particular statute or constitutional provision that underlies the substantive claim in the case. This does not imply a lesser test of standing, but simply an informed one. The problem in this case is that the District Court misunderstood Section 5, suggesting that standing cannot exist for those who are excluded from voting unless there is an allegation and proof of racial discrimination *before the local district court.* It is not enough, said the District Court, that the type of change *could* have a discriminatory purpose or effect, since such an injury is "conjectural and hypothetical," not "actual or imminent." J.S. App. 9a. As explained in the jurisdictional statement, however, the role of local Section 5 enforcement courts is to determine whether a particular type of change could affect voting, not whether the specific change has a discriminatory purpose or effect. J.S. 13-14, *citing, Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Perkins v. Matthews*, 400 U.S. 379 (1971). Also, the case law makes it clear that Section 5 enforcement courts should look to the *type* of change involved to determine if it is a voting change without requiring that plaintiffs prove a potential for discrimination in each individual case. *See, Allen*, 393 U.S. at 570; *Perkins*, 400 U.S. at 388-389; *Presley v. Etowah County*, 502 U.S. 491, 502 (1992) (discussing the "typologies" of changes that have been held to be covered by Section 5).

As the District Court noted, the appellants do not own property in the business improvement district at issue. J.S. App. 9a. As it further noted, their claim is that they are impacted by the challenged changes because they are thereby excluded from

voting on the establishment of this business improvement district, which will supplement or displace the city government of their city, the City of Jackson, with respect to various public municipal functions. J.S. App. 9a-10a. Certainly, there is no more concrete injury in a voting case than actually being *denied the opportunity to vote*. If the denial at issue in this case is going to be imbedded in Mississippi law and implemented in the City of Jackson in a way that prevents the appellants from voting, it first should be subjected to Section 5 scrutiny.

Yet the appellees assert that the changes "have no effect whatsoever on the composition of the city electorate, and no effect whatsoever on any other aspect of city elections or city services," Mot. to Aff. 6, and "do not effect any change in . . . any existing electorate." *Id.* 7. Therefore, they suggest, those excluded from voting on the business improvement district have no standing. But certainly, the unprecleared statute outlining the potential activities of business improvement districts makes it clear that these districts have the power to perform traditional city services -- such as fire prevention, assisting in law enforcement, and management of public facilities and parks. *See,* J.S. 4. And while the existing electorate of the City of Jackson has not been altered, these changes create a new and limited electorate, from which the appellants and most city voters are excluded, that will affect at least some of these public functions. Surely, those who are a part of the electorate for the city's government, which traditionally performs these functions, but who are excluded from voting on this new entity, have standing to challenge the failure to preclear these voting changes.[1]

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[1] By claiming that appellants do not have standing since they do not own property or reside within the business improvement district, both the appellees, Mot. to Aff. at 4, and the District Court, J.S. App. 9a, suggest that property owners within the district do have standing. But no one explains how those allowed to vote because of property ownership have standing, while those excluded do not. It is our position that all voters in the city have standing,

As pointed out in the jurisdictional statement, J.S. 7, this Court has not had occasion to address the issue of standing under Section 5 since the 1969 decision in *Allen v. State Board of Elections*, 393 U.S. at 557. It also has not addressed the issue of Section 5 coverage for voting changes involving special purpose districts. Yet the appellees argue that even if this Court

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both those allowed to vote for the business improvement district and those excluded. Individual property owners within the district certainly are affected by the change inasmuch as they are the people who are required to pay additional taxes -- so long as the district is established and approved by a 70% vote -- whether or not they cast their own ballot in favor of the business improvement district. If the change ultimately is submitted for preclearance, they could, for example, ask the Attorney General or the District Court for the District of Columbia to consider whether racial discrimination was involved in targeting certain people to pay these extra taxes. Those who are excluded from voting, such as the appellants, also are affected because the changes allow the establishment of a new public entity that will be performing various municipal public functions formerly performed by the city government of Jackson. Whether the business improvement district's efforts displace or simply supplement some of the functions of the city government, the appellants clearly have a voice in choosing the city government, but have none in the creation of the new district. If the change ultimately is submitted for preclearance, the appellants can and likely will ask the Attorney General or the District Court for the District of Columbia to consider the fact that with demographic changes, Jackson only recently has become a majority black city, only recently has elected a black mayor for the first time, and only recently elected a majority black city council. As these developments occurred, a new entity composed mostly of white property owners has been created over which the appellants and the majority black electorate have no voice, but which will displace or at least supplement certain important public functions. This is not, of course, the business of the local district court, but instead is the business of the Attorney General or the District Court for the District of Columbia. It is mentioned here simply to illustrate that, for this type of change, all municipal voters have standing under Section 5, and therefore plaintiffs in an enforcement case such as this need only allege that they are voters within the city. *See, NOW v. Scheidler*, 510 U.S. 249, 256 (1994) (motion to dismiss on grounds of standing should be denied "if relief could be granted 'under any set of facts that could be proved consistent with the allegations.'").

were to decide that the standing issue deserves review on the merits, probable jurisdiction should *not* be noted, and the District Court should summarily be affirmed, on the alternative ground that changes involving special purpose districts such as the ones at issue here are not voting changes covered by Section 5. Mot. to Aff. 7-11. In light of its ruling on standing, the District Court did not address the coverage question. J.S. App. 10a. As set out in the remainder of this brief, we believe these are voting changes covered by the statute. Assuming standing exists, the coverage question either should be remanded to the District Court or decided by this Court on the merits. But it is not and should not be an alternative basis for a summary affirmance.

Section 5 covers "voting qualification[s] or prerequisite[s] to voting, or standard[s], practice[s], or procedure[s] with respect to voting." By allowing for the creation of a public entity that can only be established through an election, by setting out the means of defining the election district, by setting out the qualifications of voters in the district, by setting out the method of alloting and counting the votes, and by establishing the date of the election from within a specified district, the state statute at issue and the related action of the City of Jackson encompass -- as a matter of language and common understanding -- "voting qualification[s] or prerequisite[s] to voting, or standard[s], practice[s], or procedure[s] with respect to voting."

Also, Section 14 of the Act, which defines the term "voting" as used in Section 5, refers not only to "votes cast with respect to candidates for public or party office," but also those with respect to "propositions for which votes are received in an election." 42 U.S.C § 1973*l*(c)(1). This definition covers the voting involved in the creation of the business improvement district. The efforts of the defendants to somehow distinguish the business improvement district and place it outside the context of a voting change are not supported by any of the

language in Section 5 or related provisions of the Voting Rights Act.

This Court consistently has stated "that § 5 is to be given a broad construction." *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981). With Section 5, "Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Allen v. State Board of Elections*, 393 U.S. at 566. "[T]he scope of § 5 is expansive within its sphere of operation. That sphere comprehends all changes to rules governing voting. . . ." *Presley v. Etowah County*, 502 U.S. at 501-502.

In addition, as noted in the Jurisdictional Statement, the United States Attorney General has concluded that Section 5 covers the state statute at issue here. J.S. 5; J.S. App. 4a, 16a. The Attorney General's interpretation in this regard is entitled to deference from the courts. *See, NAACP v. Hampton County*, 470 U.S. 166, 178-179 (1985).[2]

The appellees acknowledge the language of Section 14 of the Act which states that Section 5 encompasses "propositions for which votes are received in an election," but they contend that the word "propositions" is modified by the word "public"

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[2] The regulations of the Department of Justice contain a non-exclusive list of "examples of changes" covered by Section 5. That list includes "[a]ny change affecting the necessity of or methods for offering issues and propositions for approval by referendum." 28 C.F.R. § 51.13(j). This certainly could encompass the election to create the business improvement district here. In addition, the regulations cover "[a]ny change in the . . . boundaries of a voting unit." *Id.*, § 51.13(e). This also would appear to encompass the statute leading to the creation of the proposed business improvement district, which is a voting unit. At any rate, this list is non-exclusive, and even if these examples are not right on point, the Attorney General's statement that the challenged statute is a covered voting change is entitled to deference.

earlier in the sentence -- "with respect to candidates for *public* or party office and propositions for which votes are received in an election." From this they conclude that "[t]he voting which takes place in association with BIDS simply is not concerned with public office or public propositions, and is not, by definition, with the reach of the Act." Mot. to Aff. 8. Even accepting the questionable linguistic contention that "public" modifies "propositions" in Section 14, it is clear that the establishment of business improvement districts does affect public affairs such as fire prevention, assistance with law enforcement, and maintenance of public facilities and parks. *See*, J.S. 4.

Also, the appellees suggest that Section 5 governs voting changes relating only to entities that provide "*essential* services normally provided by government." Mot. to Aff. 11 (emphasis in original). Certainly, there is nothing in the language or structure of Section 5 that marks a statutory line between voting on "essential" services as opposed to those that are not "essential." But even if there were, there is no question that the legislation at issue gives business improvement districts the authority to become involved in the provision of "essential" services such as fire prevention.

In arguing that these voting changes fall outside Section 5's ambit, the appellees imply that business improvement districts are simply a collection of volunteers who band together to chip in money for common purposes, and that they do this entirely independent of the State and the City. Mot. to Aff. 1, 8. But that is totally wrong. The State, through the statute at issue here, not only accords business improvement districts the power to engage in various public municipal functions, but also specifies the means for establishing such a district, including the requirements for drawing the district, for who can vote and who cannot, for how the votes are to be counted, and for how many votes are needed to establish the district. Pursuant to the

statute, the City sets the date for an election from a specific district once it is drawn and then conducts the election. And the resulting tax payments are *not* voluntary. Even those property owners who vote against the district are levied additional taxes so long as there are enough votes to establish the district. It is the City which collects those taxes, no doubt against the will and preference of at least some of those who are taxed.

Thus, the State and the City are much more than the "honest broker" which the appellees portray as the limit of governmental involvement here. Mot. to Aff. 9. Indeed, the appellees' suggestion that the government is only an "honest broker" here is akin to suggesting that it is only an "honest broker" in political party primaries. But changes in the conduct of party primaries and certain party activies are voting changes encompassed by Section 5, *see, Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), and it is clear the changes here also are covered.

While the appellees contend that the business improvement district itself is "not a political subdivision of a covered jurisdiction," Mot. to Aff. 9, that is beside the point. *The State* clearly is a covered jurisdiction and *the City* is a political subdivision of it. When they make changes involving voting, as they have done here, they must submit them for preclearance.

The appellees cite decisions holding that some special purpose districts are not governed by the one-person, one-vote rule of the Fourteenth Amendment. Mot. to Aff. 10. However, those decisions make it plain that even though the particular strictures of the one-person, one-vote rule do not apply, the general provisions of the equal protection clause do. *See, e.g., Salyer v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 730 (1973). And this Court has made it clear that even though particular sorts of elections may fall outside the one-person, one-vote rule, changes involving those elections

nevertheless are covered by Section 5. *Compare, Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972) (three-judge court), *summarily aff'd*, 409 U.S. 1095 (1973) (one-person, one-vote rule does not apply to state court judicial elections), *with Clark v. Roemer*, 500 U.S. 646 (1991) (Section 5 covers state court judicial elections). *See also, Chisom v. Roemer*, 501 U.S. 380, 402-403 (1991).

In light of all of this, the changes at issue are voting changes covered by Section 5.

For all of these reasons, as well as those set out in the jurisdictional statement, probable jurisdiction should be noted.

Respectfully Submitted,

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